IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1290

ARTHUR GOLDSTEIN

Petitioner

v.

CITY OF NORFOLK

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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Arthur Goldstein, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case on the 20th day of November, 1978.

MATERIAL PROCEEDINGS AND OPINIONS BELOW

Petitioner, Arthur Goldstein, was indicted August 3, 1977 by the Grand Jury of the City of Norfolk for the sale of an allegedly obscene magazine "Look" in violation of Section 31-86 of the Code of the City of Norfolk, punishable as a misdemeanor carrying a maximum sentence of twelve months in jail and a $1,000 fine.

Petitioner moved to dismiss the indictment upon the grounds that a) the ordinance was unconstitutional both as to the State and Federal Constitutions and b) the City exceeded its authority in enacting the ordinances. The motion was overruled.

Petitioner asked for a trial by the Court and expressly waived his constitutional right to trial by jury. The City asked for a jury trial and the Court required a trial by jury over

defendant's objection.

A jury of five members was empaneled on October 20, 1977, under the authority of Section 19.2-262(2) of the Code of Virginia.

The five members of the misdemeanor jury turned out to be five women, and the foreman, a member of TRIS (Tidewater Rape Information Service). Petitioner excepted to the composition of the jury of all women on the grounds that such a jury would be unable to resolve the issue of the contemporary community standards of the average person in the City of Norfolk.

The two day trial concluded on October 21, 1977 in a verdict of guilty with the jury fixing punishment at six (6) months in jail and a fine of $1,000. Petitioner moved to set aside the verdict as contrary to the law and the evidence and further moved

the Court for time to prepare legal memoranda in support of the motion and to argue same. The motion was granted.

A copy of the trial order for the first day of trial is attached hereto as Appendix "A" and a copy of the trial order for the second day of trial is attached hereto as Appendix "B." Together they embody the motions, objections and rulings thereon that ensued at trial.

Thereafter, briefs were filed and argument heard on the motion of Petitioner to set aside the verdict of the jury, which motion of the Petitioner was overruled by Order entered on the 14th day of February, 1978, a copy of which is attached hereto as Appendix "C." Sentencing was scheduled for April 4, 1978.

Prior to sentencing, on March 21, 1978, this Court decided the case of

Ballew v. Georgia, 435 U.S. ____, 55 L.Ed.2d 234, 98 S. Ct. 1029, which holds that a jury composed of five members deprived an accused of his rights under the Sixth and Fourteenth Amendments.

A motion for a new trial (Appendix "D") on the basis of Ballew was denied by the trial Court on the grounds that it was not to be applied retroactively. The trial Judge's letter opinion dated March 27, 1978, denying the motion is attached hereto as Appendix "E."

On April 4, 1978, Goldstein was sentenced in accordance with the jury's verdict. The sentencing order is attached as Appendix "F."

Petitioner timely filed his Petition for Appeal to the Supreme Court of Virginia, which Petition was refused by order of the Supreme Court of Virginia entered November 20, 1978. This order is attached hereto as

Appendix "G."

On December 21, 1978, the Supreme Court of Virginia stayed the execution and enforcement of its judgment rendered November 20, 1978 until the 18th day of February, 1979 (which happens to fall on a Sunday), pending action by the Petitioner to perfect his Petition to this Honorable Court, and a continued stay thereafter until a final determination by the United States Supreme Court. This order of December 21, 1978 is attached hereto as Appendix "H."

JURISDICTION

The decision of the Supreme Court of Virginia was rendered on the 20th day of November, 1978. This Petition follows within 90 days thereof. Jurisdiction is invoked pursuant to 28 U.S.C.§ 1257 (3).

QUESTIONS PRESENTED

I. Where a defendant had not been sentenced on a verdict by a five person jury at the time such a jury was declared unconstitutional, was defendant entitled to a new trial before a constitutionally acceptable jury?

II. Does the Norfolk City obscenity ordinances violate the Equal Protection Clause of the Constitution of the United States?

III. Where an issue in a case is the contemporary community standards of a City, could a five member jury composed solely of women determine such an issue?

PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION, STATUTES OF VIRGINIA AND CITY ORDINANCES OF THE CITY OF NORFOLK

The following provisions of the Constitution of the United States are

involved in this Petition; namely, the Sixth and Fourteenth Amendments. The pertinent portions thereof are set forth in Appendix "I" hereof.

The following sections of the Code of Virginia are cited herein. They are set forth in pertinent part in Appendix "J" hereof and they are:

Section 18.2-11
Sections 19.2-262(2)

Those sections of the Norfolk City Code referred to herein are Sections 31-85; 31-86; 31-87; 31-92; 31-94, which sections are set forth in Appendix "K" hereof.

STATEMENT OF THE CASE

On June 2, 1977, one Leroy David Lynch went into a bookstore and newstand known as Henderson's located on Granby Mall in the City of Norfolk, Virginia. He purchased several books from Arthur

Goldstein, the owner and proprietor. (hereinafter called Petitioner). Upon exiting, he was "arrested" by a Norfolk police officer attached to the K-9 Corps, and was taken to the police station. He was never charged with any crime, but instead went to Norfolk police investigator S. F. Auer, attached to the Vice Squad. A controlled purchase was set up, and Lynch returned to the vicinity of Henderson's with Investigator Auer.

The officer went into the store and saw the magazine "Look" opened to a certain page. He left the store and described the article to Lynch, who then went in and made the purchase from the defendant for $7.50.

Lynch left the store, and together with the officer went to the Magistrate's office at the police station where a warrant was secured for the arrest of

the Petitioner. Auer went back to the store and arrested Petitioner for the sale of an allegedly obscene item.

The Judge of the Norfolk General District Court, Criminal Division, dismissed the warrant "without prejudice" on the basis that the "contemporary community standards" test of obscenity must be determined by a jury.

Thereafter, Petitioner was indicted and tried, over his objection and exceptions, by a five person jury for violating a Norfolk City ordinance prohibiting the sale of obscene items.

At the conclusion of a two day trial, the jury returned its verdict of guilty, and set the defendant's punishment at six (6) months in jail and a fine of $1,000.

Petitioner's motion to set aside the verdict of the jury as contrary to the law and the evidence was continued to

allow counsel to prepare and file briefs. The motion was thereafter argued on February 14, 1978 and overruled. A pre-sentence report was ordered by the Court from its probation department.

While sentencing was pending, this Court decided Ballew v. Georgia on March 21, 1978. Petitioner promptly on March 24, 1978, moved the trial Court for a new trial in light of Ballew, which the trial Court, just as promptly, on March 27, 1978, denied.

A petition for writ of error to the Supreme Court of Virginia, having been unavailing, this petition followed.

HOW FEDERAL QUESTIONS ARE RAISED

Petitioner initially moved the trial Court to dismiss the indictment on the grounds that the City ordinance allegedly offended was unconstitutional.

Prior to trial, when Petitioner was faced with a jury trial where there would be but five jurors, Petitioner tried to waive a jury. When denied such a waiver, he noted his exception. He further took exception to the makeup of the jury. Prior to being sentenced on the jury verdict, he moved for a new trial based upon this Court's having declared a five person jury unconstitutional.

Petitioner's initial appeal was based, in part, on the violation of his rights under the United States Constitution. His assignments of error to the Supreme Court of Virginia alleged that he was entitled to a new trial in light of Ballew; the Norfolk City ordinance was unconstitutional being in violation of the Equal Protection Clause of the Fourteenth Amendment; and a five woman jury was not such a cross section of the community as could determine

contemporary community standards.

This petition follows the refusal of the Supreme Court of Virginia to grant the Petitioner his appeal on such issues.

REASONS FOR GRANTING THE WRIT

I.

THE HOLDING OF BALLEW v. GEORGIA THAT A FIVE MEMBER JURY WAS UNCONSTITUTIONAL MANDATED A NEW TRIAL WHERE A MOTION FOR SAME WAS MADE PRIOR TO JUDGMENT.

By Section 31-92 of the Norfolk City Code, the violation of the City's obscenity laws carries the same punishment as that of a Class One Misdemeanor under Section 18.2-11 of the Code of Virginia; that is, jail confinement for not more than twelve months or a $1,000 fine, either or both. A five member jury does not satisfy the jury trial guarantee of the Sixth Amendment

as applied to the States through the Fourteenth Amendment. Ballew v. Georgia, 435 U.S. ____, 55 L.Ed. 234, 98 S.Ct. 1029 (1978).

When Ballew was brought to the attention of the trial Judge while Petitioner was yet to be sentenced, the Court rejected its retroactive effect.

It has been settled for more than a decade that"...the Constitution neither prohibits nor requires retrospective effect...." Linkletter v. Walker, 381 U.S. 618, 629 (1965).

In Linkletter, this Court formulated three criteria for determining whether to grant retrospective or prospective application to new Constitutional standards. These three criteria include: (a) the purpose of the new rule, (b) the reliance on the old rule by law enforcement officials, and (c) the effect of retroactive

application on the administration of justice. Linkletter, supra, at 629. By far the most important of these three considerations is the new rules purpose. Only where the purpose does not clearly favor retroactivity or prospectivity should the Court consider reliance on the old rule and the effect of retroactive application. Desist v. United States, 394 U.S. 244, 251 (1969).

The balancing of these relevant factors contemplated by the Linkletter decision is to be accomplished on a case-by-case basis. It has been stated that:

> "...[R]etroactivity is essentially a pragmatic, case-by-case result-oriented process whereby the often competing interests of society, the accused (or by now, the convicted) and the efficient administration of justice are balanced and weighed. There are no hard and fast rules, no shorthand formulae,

> in the retroactivity area- only factors, equities and considerations". Vaccaro v. United States, 461 F.2d 626, 629 (5th Cir. 1972).

When the facts as presented in the instant case are examined in light of the three elements of the Linkletter test, it logically must be concluded that Ballew be accorded retroactive application and the Petitioner granted a new trial.

In Ballew, this Court declared unconstitutional a Georgia law which permitted trial by a five person jury in misdemeanor cases. The Court's purpose in fashioning this new constitutional standard was to protect the integrity and accuracy of jury verdicts. Justice Blackmun, writing for the Court, pointed to a number of studies which called into question the efficacy of jury determinations when

less than six participated. He discussed recent data which suggested that:

> "...progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact finding and incorrect application of the common sense of the community to the facts...." Ballew, supra, 55 L.Ed.2d at 242. (Italics supplied)

Statistics also showed that the risk of convicting an innocent person rises as juries became smaller while the opportunity for compromise resulting in conviction of lesser included offenses and smaller numbers of counts diminished. id. at 243. The Court concluded that the data examined raised serious doubts about the reliability of panels smaller than six and that any reduction below that number "that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries

from truly representing their communities, attains constitutional significance." id, at 246. (Italics supplied).

When the purpose of a new constitutional standard involves the removal of some problem with the integrity or accuracy of the fact finding process, this Court has universally accorded that decision retroactive effect. In Roberts v. Russell, 392 U.S. 293 (1968), this Court granted retrospective effect to its ruling that the admission at a joint trial of a defendant's extra-judicial confession which implicated a co-defendant violated the co-defendant's Sixth Amendment right of confrontation because such a violation resulted in a "serious flaw" in the fact finding process. See also, Berger v. California, 393 U.S. 314 (1969). When the right involved has been the right to counsel,

this Court has always afforded retrospective effect because of counsel's primary responsibility for presenting a complete set of facts upon which a jury could base its decision. See, McConnell v. Rhay, 393 U.S. 2 (1968); Arsenault v. Massachusetts, 393 U.S. 5 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963).

This Court has also granted retroactive effect when a new ruling has dealt specifically with a flaw in the jury's fact finding processes. In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court afforded retroactive effect to its decision that an Illinois statute which permitted challenges for cause of any juror who expressed a general objection to capital punishment was unconstitutional. This Court stated that such a systematic exclusion of a

large portion of potential jurors "...necessarily undermined the very integrity of the...process that decided the prisoner's fate...id. at 523. The same result was reached in Whitus v. Georgia, 385 U.S. 545 (1967) when blacks were systematically excluded from jury lists. cf. Daniel v. Louisiana, 420 U.S. 31 (1975).

Finally, with regard to the importance attached by this Court to the purpose of a new rule, the Court stated in Williams v. United States, 401 U.S. 646, 653 (1971).

> "Where the major purpose of new Constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by State or Federal

> authorities, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances."

The Ninth Circuit Court of Appeals had accepted a similar rule one year earlier in United States v. Scott, 425 F2d 55, (9th Cir. 1970). It was stated that:

> "...where the rule is fashioned to correct a serious flaw in the fact-finding process and therefore goes to the basic integrity and accuracy of the guilt-innocence determination, retroactive effect will be accorded." id. at 58.

There can be little question but that this Court's primary purpose in placing a limit on the size of juries was to correct what it perceived to be a flaw in the fact finding process. When a new rule performs such a function, the Court in Desist and Williams has indicated that the Linkletter retroactivity test has

been met. Such a purpose outweighs any notions of reliance on old standards or the supposed effect on the administration of justice. This is particularly true in the facts presented by the Petitioner because an obscenity trial was involved. The jury in an obscenity case has the dual function of deciding guilt or innocence and reaching a decision concerning the most important element of the alleged crime -- whether or not the material violated the community standard. When an obscenity trial is flawed by an infirm process later corrected by a new constitutional doctrine, a special case for retroactive application is presented.

Despite the fact that Williams and Desist appear to indicate that the purpose of a new rule can foreclose inquiry regarding the other two factors in the Linkletter test, it can be persuasively argued that affording retroactive effect

to Ballew does not present problems involving a reliance on an old standard by law enforcement officials nor a severe impact on the administration of justice. First, there was no reliance by the State Legislature on an established doctrine when it provided for a five man jury. In fact, when this Court declared six man juries constitutional in Williams v. Florida, 399 U.S. 78 (1970), it specifically reserved judgment on the issue of whether any smaller number would pass constitutional scrutiny.

It is open to some speculation what impact a retroactive application of Ballew would have on the administration of justice. However, this Court may regulate that impact by restricting the scope of any decision seeking to apply it. Because retroactivity is neither required nor prohibited, a Court may

limit the effect of a new rule as it sees fit. Linkletter, supra, at 629. This Court has reaffirmed that rule in Bradley v. School Board of Richmond, 416 U.S. 696 (1974), stating that:

> "This Court in the past has recognized a distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand, and its effect on a final judgment under collateral attack, on the other hand." id. at 710.

The Ballew case was decided before judgment was entered on the Goldstein jury verdict and while the matter was still in the breast of the trial Court. The trial Judge, however, refused to grant a new trial. The West Virginia Supreme Court, faced with a timing problem similar to that in Goldstein, granted retroactivity yet restricted it to criminal cases then in trial or appellate process. State v. Pendry,

227 S.E. 2d 210 (W.Va. 1976).

In Pendry, the trial court had granted the prosecution an instruction on the burden of proof being on an accused murderer to overcome the presumption of malice. While on appeal on other points, this Court decided Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), holding therein that such a rule of law unconstitutionally shifted the burden of proof.

In reversing, the Pendry Court stated:

> "It is our view that the doctrine of Mullaney, insofar as it affects the burden of proof which is carried by a defendant and insofar as it affects the utilization of "presumptions" (more properly "inferences") in instructions, should be applied to all criminal cases now in trial or appellate procedures and should not otherwise be retroactive." Id. at 224.

The Ballew decision cured a defect in jury composition which this Court recognized as a serious threat to the accuracy and integrity of verdicts. In such cases, there is widespread acceptance of the notion that these new rules are afforded retroactive application. Also, a decision granting retroactivity to Ballew would not substantially interfere with the administration of justice nor undermine any good faith reliance by law enforcement officials on an old standard.

For all of which Petitioner's conviction should be set aside and he should be remanded for a new trial before a constitutionally acceptable jury.

II

THE NORFOLK CITY OBSCENITY ORDINANCES ARE UNCONSTITUTIONAL ON THE GROUND THAT THEY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner was convicted of knowingly and unlawfully selling an obscene magazine in violation of Section 31-86 of the Norfolk City Code, which ordinance reads in pertinent part: "It shall be unlawful for any person in this city knowingly to: ...(3) Publish, sell... within this city or distribute...any obscene item...." By Section 31-85 of the City Code, an obscene magazine is included within the definition of obscene items. So too are films and motion pictures.

Section 31-87 of the City Code then proceeds to exempt employees of a theatre so long as such employee is neither the manager thereof, nor an officer of the entity nor has a financial interest

therein.

Furthermore, Section 31-94 exempts 1) the distribution of any obscene book, magazine, or other printed material by any public library or school; 2) the distribution of any obscene "work of art"; and 3) the exhibition or performance of any obscene play or motion picture by any theatre, museum or school supported by public appropriation.

Thus, where an employee of a bookstore such as Henderson's can be convicted of selling an obscene magazine, an employee of a motion picture theatre could not be convicted of showing an obscene movie. Neither could the librarian of a public library be convicted of lending out the very magazine in controversy were that magazine in the library. Nor could anyone be charged with violation of the City's obscenity law were the most obscene play or motion picture shown

at Chrysler Hall or the Chrysler Museum, both of which are supported by public appropriations.

The ordinances thus set up two (or more) classes. Any person, except (1) an employee of any person or legal entity operating a theatre, if the employee is not the manager or an officer thereof or has no financial interest therein except salary or wages and except (2) a person who distributes, exhibits or loans any obscene material under the aegis of a public library, public school or public museum and except (3) a person who exhibits, performs in or shows any obscene play, drama or motion picture in a public theatre, public museum or public school, constitutes the first class. Those persons falling within the three exemptions stated above constitute the second class. A member of the first

class is guilty of a misdemeanor and subject to fine and imprisonment if he violates Section 31-86. A member of the second class is not.

While "[e]qual protection does not require that all persons be dealt with identically, ...it does require that a distinction made have relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760 (1966). While motion pictures are to be accorded the same constitutional protection as are books, Greenmount Sales, Inc. v. Davila, 344 F. Supp. 860 (E.D.Va. 1972), aff'd in part and rev'd in part, 479 F.2d 591 (4th Cir. 1973), a classification based upon control of obscene films and pictures more lenient than those imposed upon books and magazines cannot serve as a rational basis for that classification. See Miller v. California, 413 U.S. 15,

93 S.Ct. 2607 (1973), at note 8 (413 U.S. at 26) where it is said that "the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." A fortiori a classification based upon where an obscene book, magazine or other material is sold or where an obscene play or motion picture is shown (other than in one's privacy) cannot serve as a rational basis for that classification.

In Wheeler v. State, 380 A.2d 1052 (Md. 1977), the highest Court of the State of Maryland was faced with a state statute that exempted theatre employees in the same identical way theatre employees are exempted in the Norfolk City ordinance. In holding the statute to be unconstitutional, the Court said:

> "...[T]o the extent §418 prohibits some employees of legal entities from selling, distributing, publishing and printing obscene matter while allowing other employees to do so, it violates the Equal Protection Clause of the Fourteenth Amendment." Wheeler v. State, 380 A.2d 1052, 1060 (Md. 1977).

It is respectfully submitted that Wheeler is indistinguishable from the instant case. In fact the instant case is stronger, because of the exemptions carved out by Section 31-94 of the City Code.

III

A JURY CONSISTING OF FIVE WOMEN INFRINGED UPON PETITIONER'S RIGHT TO HAVE A FAIR AND IMPARTIAL JURY OF A CROSS SECTION OF THE NORFOLK COMMUNITY TO DETERMINE CONTEMPORARY COMMUNITY STANDARDS

Inexplicably of the some 39 people summonsed for the panel, 25 of them were female. After all challenges for cause and preemptory challenges had been had,

there was left to try the defendant a jury consisting of five (5) women.

Since this Court has ruled that expert testimony is not constitutionally mandated, Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973), the case was tried and the jury was so instructed that it, the jury, without expert testimony, could determine what the contemporary community standards of Norfolk were. And this was so despite the fact that expert testimony was introduced by both the prosecution and the defense.

In all sense of fairness and justice, such a constituted jury could not give the defendant a fair and impartial trial on the issue of obscenity of an obviously male oriented magazine. If, as ruled in Ballew, a jury of five is insufficient to provide a representative cross section of the community, it is even less sufficient where the five are all

women.

It is respectfully urged that the jury as constituted was not a representative jury that could come to grips with the issue of community standards and hence, this jury could not give the Petitioner a fair trial. For this reason, he asks that his conviction be set aside and he be granted a new trial.

CONCLUSION

Petitioner was sentenced upon conviction by a five person jury after this Court held such a five person jury to be unconstitutional. His conviction was for the violation of a city ordinance that violated the Equal Protection of the Laws Clause of the Fourteenth Amendment. The five member jury was composed solely of women; hence, its ability to reflect contemporary community standards was further impaired

in addition to its impermissible size.

Petitioner respectfully prays that this Honorable Court grant this Petition for Writ of Certiorari and that the judgment of the Supreme Court of Virginia rendered November 20, 1978 be reversed, that the Norfolk City obscenity law be declared unconstitutional, that Ballew v. Georgia be declared to have retroactive effect at least insofar as litigation pending at the time of the rendition of its opinion, and that at least Petitioner be granted a new trial before a constitutionally acceptable jury.

Respectfully submitted,

PAUL M. LIPKIN
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the Supreme Court of the United States upon counsel for the Respondent, Philip R. Trapani, City Attorney, and Benjamin W. Bull and Ronald G. Thomason, Assistant City Attorneys, 908 City Hall Building, Norfolk, Virginia 23510, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served on or before the 16th day of February, 1979.

PAUL M. LIPKIN
Of Counsel for
Petitioner

APPENDIX

APPENDIX A

Virginia:

In the Circuit Court of the City of Norfolk, on the 20th *day of* October *, in the year 19* 77.

CITY OF NORFOLK vs Arthur Goldstein

Attorneys for the City of Norfolk: Benjamin W. Bull
Ronald G. Thomason

Attorneys for the accused: Samuel Goldblatt
(X) Retained Robert H. Anderson, Jr.

MISDEMEANOR TRIAL ORDER - JURY TRIAL - FIRST DAY

This day came the Attorneys for the City of Norfolk and the attorneys for the accused, as aforesaid, and came as well the accused, who stands indicted for Sale of obscene item on a Misdemeanor Indictment.

Thereupon the accused, by counsel, renewed his motion, heretofore heard in this Court on the 19th day of October, 1977, to dismiss said Indictment; and for Change of Venue or venire in this matter, which motions, having been previously heard and determined, are denied, and exception noted.

Whereupon the accused was arraigned on the aforesaid Indictment #1, and after private consultation with his said counsel, tendered in person his plea of Not Guilty to said Indictment and desired to be tried by the Court. Whereupon the Attorney for the City of Norfolk, and the Court did not concur to which the defendant objected and excepted, and the Court then impanelled eleven qualified jurors and fourteen alternates, free from exceptions, having been obtained from the Venire Facias, duly directed and issued in accordance with the statute in such cases made and provided, and summoned by the Sheriff of the City of Norfolk. Thereupon from the original panel of eleven jurors, after all questions had been propounded to them, the City of Norfolk and the accused each alternately struck three, and the remaining five jurors, constituting the jury for the trial of the accused, were

duly sworn to well and truly try the issue joined. Thereupon, in the absence of the jury, the accused by counsel, objected to the panel selection process and moved for a mistrial, which motion, having been fully heard and determined by the Court, is overruled, and exception noted. Thereupon the City of Norfolk commenced to present evidence on its behalf. And having heard a part of the evidence, at 1:10 P.M., the jury was adjourned until 2:00 P.M.; whereupon the jury was sworn by the Court not to communicate with any outside person, nor permit any outside person to communicate with them relative to this trial, and not to read any newspaper accounts nor listen to nor view any radio or television broadcasts relative to this trial, but to return into Court pursuant to said adjournment and resume the consideration of this case in the same status in which it now is; and at 2:00 P.M., pursuant to the adjournment order, the accused again came, and came as well the attorneys as aforesaid, and again came the jury heretofore sworn, and continued to hear evidence presented on behalf of the City of Norfolk. And at its conclusion, and having heard all the evidence presented on behalf of the City of Norfolk, the accused by counsel, moved the Court to strike the City of Norfolk's evidence, which motion, having been fully heard and determined by the Court, is overruled, and exception. Thereupon the accused commenced to present evidence on his own behalf. And having heard the evidence in part, at 5:15 P.M., the jury, having been again sworn by the Court as in previous adjournment, was adjourned until tomorrow morning, Friday, the 21st day of October, 1977, at 10:00 A.M.

And the defendant was allowed to depart pursuant to the terms of his recognizance.

John W. Winston
JOHN W. WINSTON, Judge

(Case of Arthur Goldstein)

Virginia:

In the Circuit Court of the City of Norfolk, on the 21st *day of* October *, in the year 19* 77.

CITY OF NORFOLK vs Arthur Goldstein

Attorneys for the City of Norfolk: Benjamin W. Bull
Ronald G. Thomason

Attorneys for the accused: Samuel Goldblatt
(X) Retained Robert H. Anderson, Jr.

MISDEMEANOR TRIAL ORDER - JURY TRIAL - FIRST DAY

This day again came the Attorneys for the City of Norfolk and the attorneys for the accused, and again came the said accused, who stands indicted for Sale of obscene item, and again came the jury heretofore sworn, pursuant to the adjournment order of the 20th day of October, 1977.

Thereupon the accused continued to present evidence on his own behalf, and at its conclusion there was no evidence in rebuttal presented. And having heard all the evidence, the accused by counsel, renewed all motions previously made in this trial, which motions are overruled, and exception noted. Thereupon having all the evidence, heard/the instructions of the Court, and closing argument of counsel, the jurors were sent to their jury room to consider their verdict. They subsequently returned their verdict in open court, reading: "We, the jury, find the accused guilty of the Sale of an Obscene Item as charged in the indictment and fix his punishment at a fine of $1,000.00 and 6 months in jail. Mary C. Muckleroy Forewoman." Thereupon the jury was discharged. Thereupon the defendant by counsel, moved the Court to set aside the verdict as contrary to the law and the evidence, and further moved the Court that he be allowed to prepare legal memoranda in support of said motion and to argue the matter before this Court, which motion, having been fully heard, is granted. And it is Ordered that the

defendant be allowed Sixty (60) Days in which to prepare briefs on this motion, and further that the City of Norfolk be granted Fourteen (14) Days to respond to said briefs. And the matter is continued generally on the docket of this Court.

Thereupon on motion of the defendant by counsel, it is ordered that the said defendant be allowed to remain on bail bond currently in effect, pending ruling on the aforesaid motion.

And the defendant was allowed to depart pursuant to his recognizance.

John W. Winston
JOHN W. WINSTON, Judge

(Case of Arthur Goldstein)

Virginia:

In the Circuit Court of the City of Norfolk, on the 14th *day of* February *, in the year 19*78.

City of Norfolk vs Arthur Goldstein

On conviction of Sale of an obscene item - On motions thereon

O R D E R

This day again came the defendant by counsel in the persons of Samuel Goldblatt and Robert H. Anderson, Jr., and came as well the Attorneys for the City of Norfolk in the persons of Benjamin W. Bull and Ronald G. Thomason.

And it appearing to the Court that by Order of this Court, heretofore entered on the 21st day of October, 1978, the said Arthur Goldstein was convicted by a jury as aforesaid, and punishment fixed by said jury; and that upon motion of the defendant by counsel, to set aside the verdict of the jury, the Court allowed the defendant and the City of Norfolk to submit briefs thereon, and the matter was continued generall on the docket of this Court.

And the Court, having considered all briefs submitted, and now having heard argument of counsel, does overrule motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence, and exception of the defendant is noted.

Thereupon on motion of the defendant by counsel, this matter is referred to the Probation Officer of this Court for a Pre-Sentence Report, the hearing on which will be heard on a date mutually agreeable to all parties involved; and the defendant is allowed to remain on bail bond, currently in effect, pending sentencing.

John W. Winston
JOHN W. WINSTON, Judge

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

CITY OF NORFOLK,	:	
	:	
Plaintiff	:	Indictment for Sale of Obscene Item: "Look"
vs.	:	
	:	
ARTHUR GOLDSTEIN,	:	
	:	
Defendant.	:	

MOTION FOR NEW TRIAL

NOW COMES the defendant, ARTHUR GOLDSTEIN, whose trial before a five man jury was had in this Court on October 20, 1977, and found said defendant guilty and who has not of yet been sentenced upon said verdict and moves the Court to set aside the verdict and grant him a new trial on the grounds that the jury which tried and convicted him was unconstitutionally constituted, as just decided by the Supreme Court of the United States in Ballew versus Georgia - U.S. (decided March 21, 1978).

ARTHUR GOLDSTEIN

By _____
Of Counsel

Samuel Goldblatt
GOLDBLATT, LIPKIN, COHEN, ANDERSON & JENKINS
804 One Main Plaza East
Norfolk, Virginia 23510

CERTIFICATE

I certify that a true copy of the foregoing pleading was mailed/delivered this the 24th day of March, 1978, to Benjamin W. Bull, Assistant City Attorney, 908 City Hall Building, Norfolk, Virginia.

_____
Samuel Goldblatt

APPENDIX E

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN W. WINSTON
JUDGE

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

March 27, 1978

Samuel Goldblatt, Esquire
Goldblatt, Lipkin, Cohen,
Anderson and Jenkins
804 One Main Plaza East
Norfolk, Virginia 23510

Re: City of Norfolk
v. Arthur Goldstein

Dear Mr. Goldblatt:

At the jury trial held on October 20, 1977, your client did not object to the selection of a jury comprised of only five persons. Now before sentencing, and in reliance upon Ballew v. Georgia (decided by the United States Supreme Court on March 21, 1978) he moves this Court to set aside the jury verdict and to grant him a new trial. The motion was filed March 24, 1978.

The motion is denied. DeStefano v. Woods, 392 US 631 (1968); Taylor v. Louisiana, 419 US 522 (1975); Daniel v. Louisiana, 420 US 31 (1975). The rule in Ballew, supra, requiring at least six-person juries in nonfelony trials is not to be applied retroactively to convictions obtained by juries empaneled prior to March 21, 1978.

Very truly yours,

John W. Winston

John W. Winston
Judge

JWW:s

cc: Benjamin W. Bull,
Assistant City Attorney

APPENDIX P

Virginia:

In the Circuit Court of the City of Norfolk, on the 4th *day of* April, *in the year 19* 78.

CITY OF NORFOLK vs. Arthur Goldstein (M340-78)

Attorney for the City: Benjamin Bull
Attorneys for the accused: Samuel Goldblatt and Paul M. Lipkin
(Retained by the accused)

MISDEMEANOR SENTENCING ORDER

This day again come the Attorney for the City of Norfolk and the Attorneys for the accused, as aforesaid, and came as well the defendant in person, who stands convicted on misdemeanor indictment #1 for Sale of an Obscene Item and sentenced by a jury to confinement in the City Jail for six months and a fine in the sum of $1,000.00. Thereupon the Probation Officer of this court, to whom this case has been previously referred for investigation, appeared in open Court with a written report, a copy of which has been delivered to counsel for the defendant. Whereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case. Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer and such additional facts as were presented by the defendant, doth now fix the defendant's punishment at confinement in the City Jail for the term of Six Months, fined in the sum of $1,000.00 and that he be required to pay the costs of his prosecution. Thereupon the defendant by counsel, moved the Court to postpone the said judgment, which said motion being fully heard, is sustained, and it is ordered that the said judgment be postponed for the period of Thirty Days or until the Supreme Court of Virgnia has granted an appeal in this case. It is further ordered that the transcript of the trial, when filed be made a part of the record. And the defendant was allowed to continue on bail bond and to depart.

Office of HUGH L. STOVALL Clerk of the Circuit Court Norfolk, Virginia

A COPY, TESTE: HUGH L. STOVALL, CLERK
BY: D.C.

JOHN W. WINSTON, JUDGE

APPENDIX G

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 20th *day of* November, 1978.

Arthur Goldstein, Appellant,

against Record No. 780928
Circuit Court No. M340-78

City of Norfolk, Appellee.

From the Circuit Court of the City of Norfolk

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard A. Beard
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 21st *day of* December, 1978.

Arthur Goldstein, Appellant,

against Record No. 780928
Circuit Court No. M340-78

City of Norfolk, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on November 20, 1978, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on November 20, 1978, be, and the same is hereby, stayed, to and including the 18th day of February, 1979, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

Allen L. Lacy
Clerk

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

****

AMENDMENT VI
Right to Speedy Trial, Witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

****

AMENDMENT XIV

Section 1.
Citizenship Rights Not to Be Abridged by States

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

CODE OF VIRGINIA

§18.2-11. Punishment for conviction of misdemeanor. - The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(b) For Class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than five hundred dollars, either or both.

(c) For Class 3 misdemeanors, a fine of not more than five hundred dollars.

(d) For Class 4 misdemeanors, a fine of not more than one hundred dollars. (1975, cc. 14, 15.)

****

§19.2-262. Waiver of jury trial; numbers of jurors in criminal cases; how jurors selected from panel. -

(2) Twelve persons from a panel of twenty shall constitute a jury in a felony case. Five persons from a panel of eleven shall constitute a jury in a misdemeanor case.

APPENDIX K

NORFOLK CITY CODE

Sec. 31-92. Punishment for violation of sections 31-86 through 31-91, 31-97 and 31-98.

Any person, firm, association or corporation committing an offense under sections 31-86 through 31-91, 31-97 and 31-98 shall be guilty of a misdemeanor and upon conviction thereof shall be confined in jail for not more than twelve months or fined not more than one thousand dollars, either or both.

****

Sec. 31-94. Exceptions to application of sections 31-84 through 31-99.

Nothing contained in sections 31-84 through 31-99 of this Code shall be construed to apply to:

(1) The purchase, distribution, exhibition or loan of any book, magazine or other printed or manuscript material by any library, school or institution of higher learning, supported by public appropriation;

(2) The purchase, distribution, exhibition or loan of any work of art by any museum of fine arts, school or institution of higher learning, supported by public appropriation;

(3) The exhibition or performance of any play, drama, tableau or motion picture by any theatre, museum of fine arts, school or institution of higher learning, supported by public appropriation.

****

Sec. 31-85. Obscene items enumerated.

Obscene items shall include:

(1) Any obscene books; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words or sounds.

****

Sec. 31-86. Production, publication, sale, possession, etc., of obscene items.

It shall be unlawful for any person in this city knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport within this city or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in section 31-85 of this Code shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in section 31-85 of this Code may pass from one person, firm or corporation to another.

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Sec. 31-87. Obscene exhibitions and performances.

It shall be unlawful for any person in this city knowingly to:

(1) Produce, promote, prepare, present, manage, direct, carry on or participate in any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution

under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or

(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place.